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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

Pierce County Cause Nos. 15-1-01998-0; 15-1-01999-8;
15-1-02001-5; and 15-1-02002-3

STATE OF WASHINGTON,

Plaintiff/Appellee,

v.

ROBERT R. COMENOUT JR., LEE ALLEN COMENOUT SR.,
MARLENE COMENOUT AND ROBERT R. COMENOUT SR.;

Defendants/Appellants.

REPLY BRIEF OF APPELLANTS

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I.

SUMMARY

Respondent, the State of Washington (hereafter “the State”), at pages 1 and 2 of its brief, seeks to outline the history of cases that have involved the Comenout’s allotment. At page 2 of the Statement of the Case, the State contends that it is attempting to dissuade the Comenouts from evading cigarette tax laws. Arguing cases is normally omitted from the Statement of Facts. RAP § 10.3(a)(5).

The State, at page 1, also quotes a pleading from another case stating that the Comenouts are carrying on “mercenary activities.” The allotments were created to promote assimilation of Indians into mainstream society. See *Cohen’s Handbook of Federal Indian Law*, § 16.03[2][a], page 1072 (Nell Jessup Newton ed. 2012). The State is apparently trying to turn case citations into facts. *Comenout v. Pierce Co. Superior Court*, 2016 WL 4945304 (W.D. Wash. Sept. 16, 2016) and *Quinault Indian Nation v. Comenout*, Nos. 15-35261 and 15-35268, are both pending cases.

The State at page 2 also cites *Comenout v. Washington State Liquor Control Board*, 2016 WL 4184367, Division I transferred from Division II, 2016 [47883-8-II]. GR 14.1 states unequivocally “A party may not cite as an authority an unpublished opinion of the Court of Appeals.” The State cites

as an exception that the citations are offered to outline the lengthy history of criminal and civil litigation surrounding the sale of untaxed cigarettes at Indian Country Store. Page. 2, f. 1. The rule does not have any exceptions. In the case, then State counsel Jennifer Elias, moved the Court to publish the decision, but the Court denied the motion. The case is not binding and should not have been cited. *Johnson v. Allstate Ins. Co.*, 126 Wash.App. 510, 108 P.3d. 1273 (Div. II, 2005) allows sanctions for violating GR 14.1, stating “And Allstate’s self-serving comment that it did not submit the opinion as controlling authority under RCW 2.06.040 does not remove the taint from its inappropriate action. Because we affirm the trial court’s ruling, the only remedy available to the Johnsons would be sanctions.” *Id.* at 519. See *Kenneth W. Brooks Trust v. Pacific Media LLC*, 111 Wash.App 393, 401, 44 P.3d 938 (2002); *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wash.App. 542, 548-49, 13 P.3d 240 (2000) review denied 143 Wash.2d 1024, 29 P.3d 717 (2001). Relying on *Brooks, supra* at 401, the Comenouts request \$100 in sanctions.

The State is trying to ignore the admonition that if they want to tax Indians in Indian Country they need to get Congressional approval.

II.

THE COMENOUT'S ADDITIONS TO STATEMENT OF THE CASE.

The Comenouts, due to later developments after the Opening Brief was filed, make the following additions to Appellants' Statement of the Case.

J. Mark Keller, Lieutenant, Washington State Liquor Control Board, indicates in his Declaration of Probable Cause, that a G.P.S. tracking device was placed on Lee Comenout Sr.'s vehicle. CP 73. The Declaration, referencing Lee Comenout Sr., states that "currently he occasionally brings King Mountain cigarettes from the Yakama Reservation. On May 21, 2015 ICSS had King Mountain cigarettes for sale." The Declaration at CP 72 (a continuation of footnote 2 from CP 71) also states in part "In addition, unstamped cigarettes remain contraband even if the tribal member cannot be prosecuted for substantive CCTA violations for the transportation. 487 F.3d at 1263. (Unstamped cigarettes themselves contraband even though Yakama tribal members may not be prosecuted for transporting those cigarettes." Lee Comenout Sr. is a Yakama Indian and lives on the Yakama Reservation. CP 71, CP 110. Robert Reginald Comenout Sr. is an enrolled member of the Tulalip Tribe and Robert Reginald Comenout Jr. is an enrolled member of the Yakama Nation. Edward Comenout died in 2010. See *State*

v. *Comenout*, 173 Wash.2d at 236. The Declaration of Probable Cause on Lee Comenout Sr. also details involvement of Marlene Comenout who enclosed a handwritten note attached to a half case of cigarettes “this half-case of cigarettes was found inside a truck being driven by Lee Comenout Sr.” CP 75. This Reply, at pages 9-11, disputes and refutes the conclusion that Yakamas’ transportation of unstamped cigarettes results in contraband.

III.

ARGUMENT

- A. **The *Comenout* Opinion, 173 Wash.2d 235 (2011), was never Binding Precedent as it never reviewed the Yakama Case of *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011) and is now made Inapplicable to this Case by *Cougar Den, Inc. v. Washington State Department of Licensing*, 392 P.3d 1014 (Wash. 2017) and *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992 (D.C. E.D. NY 2016).**

The State argues, at page 7 of its Brief, that in *State v. Comenout*, 173 Wn.2d at 236, “The Court fully considered whether Congress enacted any laws that preempted criminal jurisdiction at this property.” The State ignores Comenout’s opening brief at pages 3, 5 and 19 that state courts cannot issue search warrants on allotments. The State also ignored the argument of the Comenouts in its opening brief at pages 3 and 19. This Division, pursuant to

RCW § 2.08.010, submitted the case to the Supreme Court to decide two “narrow issues.” One was “does the State have criminal jurisdiction over tribal members selling unstamped cigarettes from a store located on tribal trust land that is not within the borders of a reservation.” (Comenout’s Opening Brief at 15). The second question overlaps the first “are the Appellants exempt from collecting State cigarette taxes to ‘Indian retailers’ under RCW § 82.24.295(1)?” The entire submission to the Supreme Court was predicated on words of art. The identical words “tribal trust land” only means land in trust for an Indian tribe. *U.S. v. Stands*, 105 F.3d 1565 (8th Cir. 1997) supplies the definition. “Tribal Trust land is land owned by the United States in trust for an Indian tribe.” *Id.* at 1572. *U.S. v. Stands*, *id.* at 1571, states “allotment is a term of art in Indian law.” *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010) makes the distinction “Reservation status is not the only way to qualify as Indian country.” *Id.* at 1006. The *Comenout* case was dismissed by the State before the seminal issue of restricted allotments could be reviewed. The Court never fully considered anything as the case was dismissed ex parte by the prosecution. *Wesley v. Schneckloth*, 55 Wash.2d 90, 346 P.2d 658 (1959) states: “A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or

has not jurisdiction. If it does not have jurisdiction, any judgment is void *ab initio* and is, in legal effect, no judgment at all. Jurisdiction should not be sustained upon the doctrine of estoppel, especially where personal liberties are involved.” *Id.* at 93-4. “The State does not acquire criminal jurisdiction either by estoppel or by stipulation.” *State v. Boyd*, 109 Wash.App. 244, 249, 34 P.3d 912 (Div II, 2001). Division Two sent the *Comenout* case back for trial and the State dismissed the case *ex parte*. The *ex parte* action prevented a trial and ultimately a habeas corpus action by the Comenouts to federal court. Due process was violated. The Comenouts had no remedy and now the State argues that the case applies. Fundamental fairness is also violated. *In re Estate of Cross*, 126 Wash.2d 43, 891 P.2d 26 (1995) applies. The Court cannot “go beyond the specific question certified to this court.” *Id.* at 49. The disclaimer contained in the State Constitution, Art. 26, Second applies. It states in relevant part:

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. (Underlining added)

Another reason that the Constitution was not relevant to the tribal trust land review is that Congress enacted P.L. 280 state jurisdiction that applies only to Indian reservations. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) states: “We have never held that Public Law 280 is independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations. *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).” *Id.* at 513. This issue is covered by Comenout’s Opening Brief at p. 23. U.S. Const., art. VI, cl.2, binds state judges. Wash. Const., art. IV, § 28. Congress never changed 25 U.S.C. § 349, 28 U.S.C. § 1353 or 25 U.S.C. § 5108. These cited statutes apply federal law to off reservation Indian allotments where the restrictions, like the Comenout allotment, are still in place. *State v. Comenout*, 173 Wash.2d 235 (2011) never discussed RCW § 64.20.030. Ch. 64.20 is headed “Alienation of land by Indians” The statute is preempted by 25 U.S.C. § 349. If RCW § 64.20.030 is not preempted, the *Comenout* decision would be correct for the reason that the restrictions would be invalid. A statute is presumed constitutional. The U.S. Constitution, Art.1, § 8, cl. 3, the most fundamental

of all laws, retains all jurisdiction of Indians to Congress. The State Constitution, Art. 26, Second, is not limited to Indian reservation lands. It applies to all lands within the state. *State v. Jim*, 173 Wash.2d 672, 273 P.3d 434 (Wash. 2012), decided after *Comenout*, held that an enrolled Yakama Indian fishing in an off-reservation reserved fishing site, could not be criminally charged with a state fishing violation. “We hold that Maryhill is reserved and held by the United States for the exclusive use of tribal members and that the State therefore lacks criminal jurisdiction.” *Id.* at 675. *Jim* distinguished *Comenout* on the basis that the *Comenout* land was “held in trust for an individual Indian not a tribe.” 173 Wash.2d at 685. The Maryhill site was available to members of three different tribes. Both sites are used for individual Indian activity by members of different tribes. The statement is also a meaningless distinction as the BIA can set allotment land aside for both tribes and individual Indians, on or off a reservation. 25 U.S.C. § 5108. *Confederated Tribes of Chehalis Reservation v. Thurston County Bd. Of Equalization*, 724 F.3d 1153 (9th Cir. 2013) was decided after *Comenout*. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011), was decided shortly before *Comenout*. These two cases were never discussed in the *Comenout* decision. When, as in this

case, Yakama Indians are transporting and marketing goods in Indian Country, *Cougar Den, Inc. v. Washington State Department of Licensing*, 392 P.3d at 1014, 1018 (Wash. 2017) applies. *U.S. v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) was thoroughly discussed in *Cougar Den* and is now followed in the same way as if it were a state case. Both courts hold that Yakama Indians do not have to give notice to the State whether transporting gas or unstamped commercial cigarettes. *U.S. v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007) holds that “Therefore, the Smiskins’ alleged transportation and possession of unstamped cigarettes without providing notice to the State cannot be the basis for prosecution under the CCTA.” *Id.* at 1272. The CCTA is not violated if state law is not violated. State law did not exempt Yakama tribal members from pre-notification. *Id.* at 1263. But the case held that no pre-notification was necessary. Here, possession is charged. If the transporter is not required to notify the state, the transporter is entitled to possess the cigarettes. *U.S. v. Smiskin*, 487 F.3d 1260, 1264 (9th Cir. 2007) held that both transportation and possession by Smiskin violated the Yakama treaty. The State’s argument at CP 72 and quoted at page 4 of this reply is flatly rejected in *Cougar Den*. “The Department noted that the superior court’s reasoning ‘could allow Yakama tribal members to avoid state laws that regulate goods by simply

contriving to possess the goods on public highways. . . .the Ninth Circuit rejected this argument that the concern was ‘unfounded, if not disingenuous’.” *supra* at 1019. Possession by a Yakama member is not illegal. The opinion in *Cougar Den* also interpreted *Smiskin*’s facts as from “transporting unstamped cigarettes from a smoke shop on an Idaho Indian Reservation to smoke shops on various Indian reservations in Washington.” *Id.* at 1018. Once notice is unneeded, the unstamped cigarettes do not violate tax or possession requirements. The reason is that RCW § 82.24.250(1)(b) states that “A person who has given notice to the Board in advance of the transportation” can bring unstamped cigarettes within the state. If notice is given, unstamped cigarettes are not contraband. RCW § 82.24.250(4). The possession and transportation both depended on whether Smiskin was exempt from notice. “As a result, the Smiskins’ possession and transportation of the contraband cigarettes violated state law.” *Smiskin, supra* at 1263. Transportation and possession are both considered together. “We conclude that applying the State’s pre-notification requirement to the Smiskins violates the right to travel guaranteed by Article III of the Treaty.” *Smiskin, supra* at 1264. The case never held that possession was prohibited. If notice was exempt, the cigarettes did not have to be stamped. Applied to this appeal, all

the cigarettes that were transported by Lee Comenout Sr. cannot be contraband. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) holds that property “not intrinsically illegal in character” is not contraband per se. *Id.* at 700. See also *State v. Alaway*, 64 Wash.App. 796, 799, 828 P.2d 591 (Div. II 1992) and *Barlindal v. City of Bonney Lake*, 84 Wash.App. 135, 925 P.2d 1289 (Div. II 1996). The State’s attempt to make cigarettes contraband if unstamped is an illogical transmutation of legal theory and supports the admonition that effective state taxation of Indians can only be obtained from Congress.

B. The Law has Materially Changed Back to Where it was in 1793 and Supersedes All Cases to the Contrary, Including the *Comenout* case in 2011. The State has No Jurisdiction to apply state tax laws to Indians in Indian Country.

The State, at page 8 of its Brief, argues that the law has not changed since 2011. The case citations ignore the case law from 1743 to date on the lack of Indian tax jurisdiction by states. This issue is reviewed in the Comenout’s opening brief at pages 12 through 14. The *Colville* case, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) changed Indian victories to losses. It departed from the long standing lack of any state tax jurisdiction in Indian Country. The law review article, cited at the Comenout’s Opening Brief at

page 15, Michael Minnis, “*Judicially Suggested Harassment of Indian Tribes! The Potawatomis Revisit Moe and Colville*” 16 Am. Indian L.Rev. 289 (1991) explains that the states never had any jurisdiction to tax Indians in Indian country. The author states “The Supreme Court legislated a right that states may require tribes to collect state taxes on cigarette sales to non tribal members in Indian Country.” *Id.* at 292. All cases to the contrary are superceded. Justice Douglas, in his concurrence in *C.I.R. v. Lester*, 366 U.S. 299, 307, 81 S.Ct. 1343, 6 L.Ed.2d 306 (1961) states “Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer.” The Allotment was established in 1926 to allow Indians to live and make a living from it. The State also argues at page 8 of its Brief, citing *Confederated Tribes and Band of the (sic) Yakima Indian Nation v. Gregoire*, 658 F.3d 1078 (9th Cir. 2011) that “Indian retailers have options regarding which funds to use to pay the taxes owed.” The opinion does not mention any fund. The argument ignores the statement in *Yakama Nation*. “The language also indicates that if an Indian retailer ever found itself facing a State collection effort for the retailer’s non-payment of the tax, the retailer would be shielded from civil and criminal liability, except in the instance

where the Indian retailer has failed to transmit the tax paid by the consumer and collected by the retailer.” *Id.* at 1088. The opinion also cites 1995 Wash. Session Laws, ch. 278 §§ 2-4, 2003 Wash. Sess. Laws, ch. 114 § 1(4), amending RCW § 82.24.030(3) and (2). Now, only a wholesaler can purchase cigarette tax stamps. The wholesaler cannot sell stamps to anyone else. The consumers are obligated to pay the cigarette tax. *Id.* at 1089. The Washington State Department of Revenue publication on cigarettes tax, March 2015, requires the purchaser to pay the tax. A copy is attached as an Appendix. It unequivocally states that if a consumer buys “from an in state tribal retailer (without a Washington or tribal tax paid stamp affixed) Washington’s cigarette tax and use tax must be paid directly to the Department of Revenue on a tax declaration for Cigarettes form within 72 hours of possession of cigarettes.” “If you have unstamped cigarettes in your possession and you are stopped by law enforcement officers, you must have evidence with you that you intended to report and pay any taxes due, such as the completed declaration. If you do not have this evidence with you, the cigarettes will be considered contraband.” The consumer “is legally obligated to pay the tax.” *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire* 658 F.3d 1078, 1089 (9th Cir. 2011). If the state

stops the non Indian purchaser with a valid warrant the purchaser can still pay in 72 hours. The cigarette tax is not paid at point of purchase. *State of New York v. Mountain Tobacco Company*, 2016 WL 3962992 at *15, mentions a New York violation by failure to ship cigarettes to a New York licensed stamping agent. There is no such crime in Washington nor does the information charge the crime if one exists. The Indian is not liable for the tax. “To summarize, despite the absence of a statutory pass through, we conclude that the overall intent of the Washington cigarette tax, with respect to on reservation sales by Indian retailers, is for consumers to be legally obligated to pay the tax.” *Yakama*, 658 F.3d at 1089. RCW § 82.24.010(6) incorporates 18 U.S.C. § 1151 that includes allotments into the definition of Indian Country. News reports on the Yakama Nation gas tax is that tribal gas stations sell gas twenty cents lower in the Yakima area than non tribal retailers. In *Cougar Den, Inc. v. Washington State Department of Licensing*, 392 P.3d 1014 (Wash. 2017) the state argued that it might be faced with a “parade of horrors.” *Id.* at 1020. Justice Fairhurst was concerned that the case would interfere with the State’s ability to tax goods. *Ibid.* at 1020. Judges are not obligated to act as tax collectors. The state also objected to the loss of revenue in the *Smiskin* case. The U.S. Constitution, Art. 1, § 28, cl. 3,

reserved both interstate commerce and Indian commerce to rule by the federal government. Indian lands are to be treated in the same way as military bases, post offices and banks. *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 732 F.3d 837 (7th Cir. 2013) arrived at the right answer for the right reason. “Federal facilities of all sorts, ranging from post offices to military bases, are scattered throughout the United States and are subject to only as much regulation by states and local governments as the federal government permits.” *Id.* at 839. The well reasoned cases arrive at the same conclusion. Congress must delegate authority to tax Indians in Indian Country. The U.S. Supreme Court had no authority to expand the authority of Congress. The case law has materially changed. Indian Reservations and allotments are scattered throughout the United States. National government of Indians has been retained for good reason.

Author Michael Minnis, *Judiciary Suggested Harassment on Indian Tribes? The Potawatomis Revisit Moe and Colville*, 16 Am. L. Rev. at 291 f.16, cited *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) and noted that Justice White stated “I think it’s amazing that the States haven’t gone to Congress.” *Oklahoma*, 498 U.S. at 514 mentions that states

may enter into agreements with tribes “And if Oklahoma and other states similarly situated find that none of these alternatives produce the remedies to which they are entitled, they may of course seek appropriate legislation from Congress.” *Cougar Den, Inc. v. State Department of Licensing*, 392 P.3d. 1014, 1020 (Wash. 2017) recognizes the *Colville* aberration and correctly states that state taxation in Indian country is a federal issue that only Congress can change. Basically, the law that states lack jurisdiction to tax Indians in Indian Country has returned to where it was prior to *Colville*. *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 685, 440 P.2d 442 (1968) cites *U.S. v. Rickert*, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903). *Rickert* held that the personal property used by Indians on their off-reservation allotment was exempt from state personal property tax. *Id.* at 444. The property was within South Dakota boundaries. South Dakota was admitted to the Union in 1889 and had a disclaimer “that until the title thereto shall have been extinguished by the United States the same shall be and remain under the absolute jurisdiction and control of the Congress.” *Id.* at 440. This is the same language as in the Washington Constitution Art. 26, Second. *Petition of Carmen*, 165 F.Supp 942 (D.C. N.D. Cal. 1958) cites *Rickert*. *Id.* at 949 f. 12. The *Comenout* case, 173 Wash.2d 235, 240-1, 267

P.3d 355 (Wash. 2011) applies the State cigarette tax statute RCW § 82.24.110 to the Comenouts even though they were on a federal allotment that could not be within Public Law 280 or Quinault Nation jurisdiction. The case is wrong, but a more expansive theory is applied to the Allotment. The *Colville* case 447 U.S. at 159, without any citation of authority, legislated a minimum burden to “require Indians to collect the state cigarette tax.” The present state cigarette tax does not require Indian retailers to collect state cigarette tax. *Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire*, 658 F.3d 1078, 1087 (9th Cir. 2011). It took 37 years to eliminate the *Colville* requirement. Regardless of *Colville*, the right answer in applying state excise taxes, including state cigarette taxes is now “only Congress can revise or restrict.” *Cougar Den*, 392 P.3d at 1020 (Wash. 2017). Many cases before *Cougar Den* hold the same. If a state desires to tax Indians in Indian country it must make an agreement with the Indians or “seek appropriate legislation from Congress.” *Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. at 514. The State Supreme Court sets precedent for subsequent cases decided in Washington. The Washington courts are now alined. Congress must solve the state tax-Indian problem.

C. The Allotment was Restricted Land Defined under 18 U.S.C. § 1151(c) Owned by Individual Indians Subject to a Restriction.

Allotments were designed to assimilate Indians into mainstream society. Indian reservations are not meant to be assimilated. They are protected mainly by treaty. “Today the definition of Indian country is found in 18 U.S.C. § 1151 . . . which was enacted in 1948.” *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 944 (8th Cir. 2010), *id.* at 1006. Page 1006, footnote 8, completely refutes the State’s criminal law argument at page 9 of its brief, “Section 1151 was originally enacted to define criminal jurisdiction, but its definition of Indian country is widely recognized to apply to civil matters as well. See *Venetie*, 522 U.S. at 527, 118 S.Ct. 948.” The allotment could not be and never was “tribal trust land.”

D. The Alford Plea Did Not Waive the Sufficiency of Information.

The State, at page 4 and 10 of its Brief, argues that the Comenout’s Alford plea forgoes the right to appeal the question of jurisdiction. The plea agreement stipulation states that an Alford Plea was offered. The Comenouts pled only to count 1 and 2, purchasing, selling or distribution without a license and possession of more than 10,000 cigarettes. The rest of the counts were dismissed. See CR 127, 112. The Brief of the State, at page 5, admits

that the issue of jurisdiction was appealable. The case that the State cites, at page 5, in support, *State v. Majors*, 94 Wash.2d 354, 616 P.2d 1237 (1980), supports the Comenouts' argument at page 37 of the brief that the informations selectively prosecute. It states unequivocally at page 356 "on the other hand, we have held that a guilty plea in Washington does not usually preclude a defendant from raising collateral questions such as the validity of the statute, sufficiency of information, jurisdiction of the court, or the circumstances in which the plea was made." (Underling added). *State v. De Rosia* 124 Wash.App. 138, 100 P.3d 331 (Div. II, 2004) vacated the Alford plea where case law invalidated the charging document. The information misstated the elements. Here the information charged unlawful sale and possession of cigarettes. The Comenouts only pled to cigarette sales connected violations. However, these counts did not apply to Indians; they applied to non Indians. *State v. Brooks*, 763 P.2d 707, 710 (Okla. 1988) requires that a cigarette tax information must specify that only non Indians have to pay the cigarette tax. *U.S. v. Brigman, Tonasket, Cook*, 874 F.Supp 1125, 1129 (U.S. D.C. E.D. Wn. 1994) dismissed an indictment that did not recognize Indian exceptions to stamping. The law was different at the time, but it is the same issue.

The information must be specific. The cigarettes were transported by a Yakama tribal member, therefore, they can be legally possessed by Indians for the reason that only violations of the notice provision, which exempts Yakama Indian transportation, makes cigarettes contraband. If bought by non Indians, the non Indian consumer has to pay the tax, not the Comenouts. The attempt to slice possession from transportation is not supported by any case. The information does not charge a crime that could apply to the Comenouts, enrolled Indian owners selling cigarettes transported by Yakama Indians.

E. The Land is Exempt from Charging Indians for Violation of State Criminal Laws.

At page 9 of its Brief, the State argues that state criminal jurisdiction exists over Indian owner's activity on the public domain allotment. The entire segment lacks a clear citation of authority. It merely states that the Comenouts were off reservation. The statute itself encompasses Indian allotments, RCW § 82.24.010(6), by incorporation of 18 U.S.C. § 1151 that includes allotments 18 U.S.C. § 1151(c); the argument of the State is unsupported by citation of authority and should not be considered. See *State v. Mason*, 170 Wash.App. 375, 384, 285 P.3d 154 (Div. II 2012). The state failed to cite the Washington case of *Wesley v. Schneckloth*, 55 Wash.2d 90, 346 P.2d 658 (1959) which is cited by the Comenouts at page 43 of their

opening brief. It is argued by the Comenouts as a case in point on lack of state criminal jurisdiction of Indians for alleged crime taking place on an off-reservation allotment. The Court held there was no state jurisdiction of a crime that was allegedly committed by an Indian on an Indian allotment. *State v. Condon*, 79 Wash. 97, 139 P. 871 (1914) also holds that the crime of larceny alleged as committed by an Indian on a restricted allotment is within the exclusive jurisdiction of the United States. *State v. Klindt*, 782 P.2d 401 (Okla. Cr. 1989) holds the same way on the non major crime of assault. In *U.S. v. Stands*, 105 F.3d 1565 (8th Cir. 1997) two crimes were involved in the case; one was committed on an Indian reservation. The crime of assault by an Indian was alleged to be committed on an Indian allotment.

“Accordingly, federal jurisdiction over the assault charges is proper only if the parcel on which the assault occurred is an Indian allotment, the Indian title to which has not been extinguished.” *Id.* at 1571. 18 U.S.C. § 1151(c) applies to land “owned by an Indian subject to a restriction or alienation in favor of the United States.” *Id.* at 1572. The Comenout land is still restricted. Therefore, it is within the exclusive jurisdiction of the federal court. 25 U.S.C. § 349, 28 U.S.C. § 1353, 25 U.S.C. §§ 334, 335. Division III, in 2016, decided a case exactly in point on this issue but did not publish

the opinion. An earlier case refutes the State's argument that criminal jurisdiction is different. "If the property is tribal or allotted land within the reservation and is either held in trust by the United States or subject to a restriction against alienation imposed by the United States, the Superior Court does not have jurisdiction." *State v. Flett*, 40 Wash.App. 277, 282, 699 P.2d 774 (Div. III 1985). *Flett* was a criminal prosecution. *Id.* at 766. Allotments can be on or off a reservation. They are treated differently than tribal land. 25 U.S.C. § 5108, 25 U.S.C. § 349.

F. Selective Prosecution and Violation of Equal Protection was Proven in this Case.

Martina Garrison was active in the cigarette sales in this case from at least 2008 on. There is additional selective prosecution or violation of due process as Indian tribes in Washington have all been offered cigarette tax contracts that exempt them from state taxes. The State at page 15 and 16 of its brief cites the Buck Act, 4 U.S.C. § 107. The same act clarifies that the Buck Act exempts Indians. 4 U.S.C. § 109. *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965) adopts the federal definition of federal area from the Buck Act. 4 U.S.C. § 110(e) and rejects all state tax legislation that seeks to tax Indians. *Id.* at 691 f.18. The cigarette tax statutes RCW § 82.24.250(1) require notice

by Indian transporters of cigarettes but not military shipments. RCW § 82.24.250(7)(b). The regulations reviewed in the Comenouts' Opening Brief at 26-7 chronicle the discrimination. Equal protection is also violated. See *Associated Grocers, Inc. v. State*, 114 Wash.2d 182, 188, 787 P.2d 22 (Wash. 1990).

CONCLUSION

The state court had no jurisdiction to issue a warrant to arrest Indians on an off-reservation restricted allotment or to prosecute the Indians including an Indian owner for state cigarette violations for cigarettes transported by Yakama Indians.

DATED this 18th day of May, 2017

A handwritten signature in black ink, appearing to read 'Robert E. Kovacevich', written over a horizontal line.

ROBERT E. KOVACEVICH, WSBA# 2723
Attorney for Defendant

FILED
COURT OF APPEALS
DIVISION II

2017 MAY 19 AM 10:45


STATE OF WASHINGTON

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief was _____
DEPUTY
served on counsel for the Plaintiff by mailing on May 18, 2017, in a
postage paid wrapper addressed as follows:

Joshua L. Choate
Assistant Attorney General
Criminal Justice Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

DATED this 18th day of May, 2017.


ROBERT E. KOVACEVICH, WSBA# 2723
Attorney for Defendant

APPENDIX A-1

Cigarette Tax

MARCH 2015

This publication provides general information about the cigarette tax. It does not cover every aspect of the tax. In addition, it does not change or overrule any administrative regulation or ruling issued by the Department of Revenue.

DID YOU KNOW . . .

If you buy cigarettes in another state and bring them back to Washington, you may owe Washington taxes.

Cigarettes purchased at military installations also carry some restrictions.

If you possess untaxed cigarettes in Washington, you may be subject to penalties.

Note: An additional cigarette tax is collected by the United States government. The federal excise tax is normally collected when a manufacturer removes cigarettes from the factory or when a importer removes cigarettes from customs custody.

TAXES ON CIGARETTES

Washington imposes a cigarette tax on the sale, use, consumption, possession or distribution of cigarettes.

The Washington tax on a pack of 20 cigarettes is \$3.025 and on a pack of 25 cigarettes is \$3.78125.

Cigarette tax is paid by purchasing tax stamps. The stamps must be affixed to cigarette packs to show proof of payment of the tax.

Cigarettes possessed in Washington are subject to cigarette tax and either the sales or use tax. Use tax is due on items that are used in Washington, including cigarettes, that are purchased without paying sales tax. Use tax is calculated in the same manner as the sales tax.

You are entitled to a credit for sales or use taxes paid to another state. There is no credit for cigarette taxes paid to another state.

When a consumer purchases cigarettes from a Washington retailer, the cigarette tax is included in the purchase price (tax stamp should be affixed to the package) and the sales tax is collected.

UNTAXED CIGARETTE PURCHASES BY CONSUMERS

Effective July 26, 2009 it is illegal to ship or transport cigarettes ordered or purchased by mail or through the internet to anyone in Washington State other than a licensed cigarette retailer or wholesaler. Shipping or transporting of unstamped cigarettes ordered or purchased by mail or through the internet to a consumer is a class C felony (maximum fine of \$5,000).

If a consumer buys cigarettes from an out-of-state retailer (i.e. while visiting Oregon or Idaho) or from an in-state tribal retailer (without a Washington or tribal tax paid stamp affixed), Washington's cigarette and use taxes must be paid directly to the Department of Revenue on a Tax Declaration for Cigarettes form within 72 hours of possession of the cigarettes. The tax declaration form is available on our website dor.wa.gov or by calling 1-800-647-7706.

Keep a copy of the completed form and evidence of payment to support your legal possession of unstamped cigarettes. If you have unstamped cigarettes in your possession and you are stopped by law enforcement officers, you must have evidence with you that you intended to report and pay any taxes due, such as the completed tax declaration. If you do not have this evidence with you, the cigarettes will be considered contraband.

PENALTIES FOR POSSESSION OF UNTAXED CIGARETTES

Any untaxed cigarettes found in your possession are considered contraband and, under state law, are subject to seizure and forfeiture. You will be assessed cigarette tax, sales or use tax, a 5% assessment penalty and a remedial penalty at the greater of \$250 or \$10 per pack.

Possession of 50 cartons or less of untaxed cigarettes, without proper notice, authorization and documentation is a misdemeanor. Possession of more than 50 cartons, without proper notice, authorization and documentation is a class C felony.

TRIBAL RESERVATIONS

Most tribes collect tribal cigarette and sales tax in place of the state taxes pursuant to tax agreements between the tribes and the state. Anyone of legal age may purchase and possess cigarettes from tribal retailers covered by one of these contracts.

Enrolled tribal members may purchase cigarettes within their tribe's jurisdiction without paying state taxes. Some Native American tribes receive an allocation of tax exempt cigarettes for this purpose.

Tribal retailers are obligated to collect tax on sales to individuals who are not enrolled members of the tribe. If a state tax or a tribal tax is not collected, non-tribal members who purchase cigarettes on reservations must pay state cigarette and use taxes on their purchases. To remit the tax, see section on "untaxed cigarette purchases by consumers" on page 1.

MILITARY RESERVATIONS

If you are on active duty or retired military person, or a dependent, you are entitled to purchase cigarettes on military reservations for your own use without owing any state tax.

Military personnel are not allowed to purchase cigarettes to give or resell to others. The military may revoke your commissary and exchange privileges if you are caught doing so. Also, the person receiving the cigarettes will be subject to the taxes and penalties described on page 1.

Note: Cigarette sales at non-military retail outlets to military personnel are taxable.

ROLL YOUR OWN CIGARETTES

Effective July 1, 2012 retailers who provide customers with access to a commercial roll-your-own (RYO) cigarette-making machine are required to provide containers for customers to transport RYO cigarettes from the retailer's place of business and to affix special RYO cigarette tax stamps to each container provided. Cigarette tubes/papers must be provided in one or more 20-units denominations.

CIGARETTE STAMPS

PROOF OF TAX PAID

In Washington, all cigarettes, except those sold on military reservations, should have a cigarette stamp affixed to the bottom of each pack or RYO container.

Washington State distributes stamps with serial numbers and various colors. Cigarettes on which Washington State cigarette taxes have been paid will have pink and blue stamps on 20-packs, and blue, white and silver stamps on 25-packs. RYO cigarettes will have a yellow and black stamp on a 20 cigarette container and violet and black stamp on a 200 cigarette container. Tax-exempt cigarettes sold on Indian reservations to tribal members will have green and white stamps labeled "Washington Tax Exempt."

Most tribes have signed contracts to sell cigarettes and are collecting tribal taxes in place of state taxes. All cigarettes sold by tribes under an agreement will have either a green compact stamp or their own tax stamp.

Purchases of tribally stamped cigarettes by non-tribal members are intended for personal use only and not for re-sale.

ENFORCEMENT

The Liquor and Cannabis Board enforces the cigarette tax for Washington State. The Board enforces retail and wholesale licensing, sales to minors, vending machine sales, sampling and illegal cigarette sales and possession.

For more information on cigarette enforcement activities or to file a complaint or a tip, you can visit the Liquor and Cannabis Board's website www.liq.wa.gov.

LICENSING

Retail, wholesale and vending machine cigarette licenses must be obtained through the Business Licenses Services. They can be reached by calling (800) 451-7985 or visiting their website at www.bls.dor.wa.gov.

Annual license fees are:

Wholesaler.....	\$650
Branch Wholesaler.....	\$115
Retailer.....	\$93
Commercial Cigarette Making Machine.....	\$93
Vending Machine.....	\$30

Wholesalers are required to post a \$5,000 Proper Performance Bond. Retailers and wholesalers are required to complete a personal/criminal history statement.

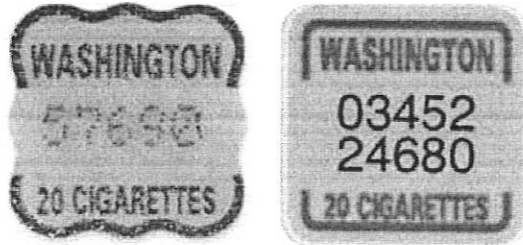
CIGARETTE TAX FUNDING

The cigarette tax is currently deposited into the state's general fund, which supports most state services. In the fiscal year 2011 (July 1, 2010 thru June 30, 2011), the cigarette tax generated \$432.6 million.

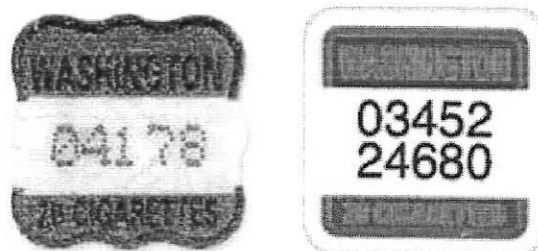
Cigarette tax stamps used in Washington State

Washington State distributes these ten stamps:

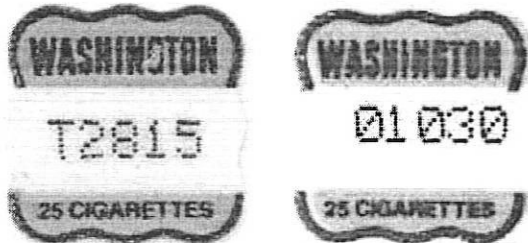
Regular stamps for packs containing 20 cigarettes



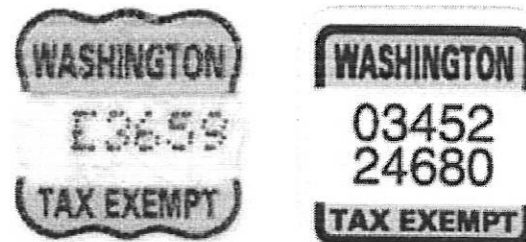
Stamps for wide packs or hand stamping



Stamps for packs containing 25 cigarettes



Indian allocation tax exempt stamps for sale to enrolled tribal members only



Actual sizes of stamps:



Effective July 1, 2012, retailers who provide customers with access to a commercial roll-your-own (RYO) cigarette-making machine are required to provide containers for customers to transport RYO cigarettes from the retailer's place of business and to affix cigarette tax stamps to each container provided.

Stamps for containers of 20 cigarettes



Stamps for containers of 200 cigarettes



Actual size of stamp:



These compact tribes have designed their own stamps. Cigarettes bearing these stamps can be purchased by anyone and are legal on and off the reservation.

Chehalis



Colville



Kalispel



Lower Elwha Klallam



Puyallup sells cigarettes with two types of stamps



Shoalwater Bay



Spokane



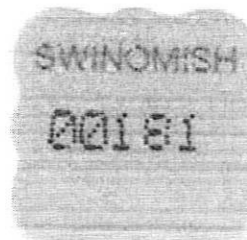
Squaxin Island sells cigarettes with two types of stamps



Stillaguamish



Swinomish



Tulalip



Upper Skagit



Actual sizes of stamps:



Compact stamps are used by tribes that have signed a contract with the state to collect cigarette and sales taxes. Cigarettes with compact stamps can be purchased by anyone and are legal on and off the reservation.



Actual size of stamp:



These tribes use the generic compact stamp:

Jamestown S'Klallam	Quinault
Lummi	Sauk-Suiattle
Muckleshoot	Skokomish
Nisqually	Snoqualmie
Nooksack	Suquamish
Port Gamble S'Klallam	

SPECIAL NOTICE

Special notice dated May 25, 2012 - Commercial cigarette-making machines operated at retail establishments and the taxation of roll-your-own cigarettes.

Special Notice dated April 13, 2010 - Cigarette tax rate increases, identifies the new tax rate that began May 1, 2010.

FORMS

Tax Declaration for Cigarettes (#82-2090)

Washington Cigarette Wholesaler Information (#82-2099)

LAWS AND RULES

Revised Code of Washington (RCW) Chapter 82.24
Tax on cigarettes

Washington Administrative Code (WAC) WAC 458-20-186
Tax on cigarettes

WAC 458-20-192
Indians - Indian Country

Special notices, forms, rules and laws and other publications are available on our website at dor.wa.gov or you can request copies by calling our Telephone Information Center at 1-800-647-7706.

FOR MORE INFORMATION

If you have specific questions about the cigarette tax, contact the Department of Revenue at 1-360-534-1503, option 3.

You may also write to:

**Special Programs
Washington State
Department of Revenue**
PO Box 47477
Olympia, WA 98504-7477
FAX (360) 534-1499

Resources to help quit smoking

Washington State Department of Health Tobacco Quit Line website: quitline.com

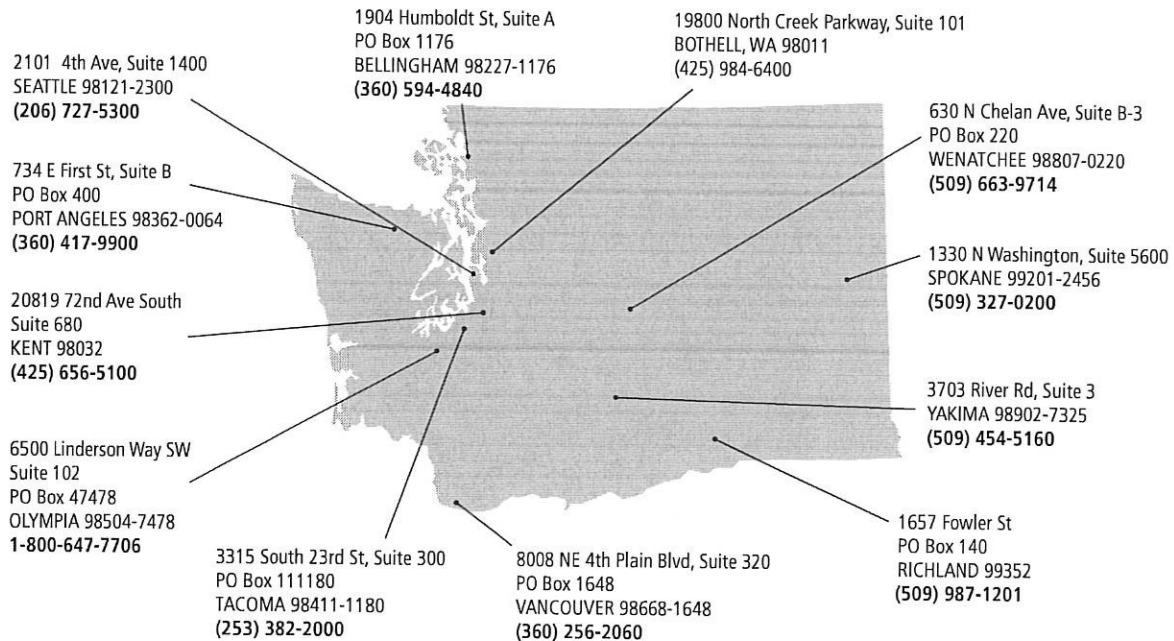
Washington Tobacco Quit Line Phone Numbers: 1-800-QUIT-NOW (1-800-784-8669)

Spanish Line: 1-877-2NO-FUME (1-877-266-3863)

Hearing Impaired: 1-877-777-6534

DEPARTMENT OF REVENUE TAXPAYER ASSISTANCE

LOCAL OFFICE LOCATIONS



TELEPHONE INFORMATION CENTER

1-800-647-7706

WEBSITE

DOR.WA.GOV

For tax assistance or to request this document in an alternate format, visit our website, dor.wa.gov or call 1-800-647-7706. Teletype (TTY) users may call (360) 705-6718.

The information contained in this fact sheet is current as of the date of this publication and provides general information about Washington's business taxes. It does not cover every aspect of the taxes, nor does it alter or supersede any administrative regulations or rulings issued by the Department.